Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

ANICETA TAMAYO, MICHAEL SALIM, and CHRISTIAN SALIM,

Petitioners

V.

JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL

Respondent

On Petition For Writ Of Certiorari
To the Decision of the United States Court of Appeals
for the Ninth Circuit

Jack P. Holmes, Esq.
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QUESTIONS PRESENTED

1. Did the trial Judge abuse his discretion in denying Petitioner's claim for political asylum?

2. Did the Board of Immigration Appeals fail to properly review the underlying appeal and issue a boilerplate decision?

3. Was Petitioner denied a full and fair hearing because the trial Judge did not act in a neutral fashion?

4. Should the Court of Appeals have remanded the matter for re-trial?

PARTIES TO THE PROCEEDING

Petitioners are Aniceta Tamayo, Michael Salim, and Christian Salim. They are respondents in the United States Office for Immigration Review (Immigration Court) and appellants in the Court of Appeals. They bring this action on their own behalf.

Respondent is the United States Attorney General, named in the underlying proceedings as John Ashcroft, now Alberto Gonzalez due to the change of the Attorney General.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The January 18, 2005 Judgment of the United States Court of Appeals denying Petitioner's Appeal appears in the appendix hereto, App. 1.

BASIS FOR JURISDICTION IN THIS COURT

This court has jurisdiction to review this matter under Andriasian v. INS, 180 F.3d 1033, 1043-47 (9th Cir, 1999) which held that the Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. This Court additionally has jurisdiction to review the Ninth Circuit's Judgment pursuant to 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

Petitioner initially applied for asylum by submitting a form I-589 to her regional asylum office more than one year after entry to the United States. Petitioner was required, under 8 U.S.C.1158(a)(3), to file that application within one year of entry unless changed circumstances could be demonstrated which justified the late filing. Petitioner was interviewed and received a decision. The asylum officer found that Petitioner had established changed or extraordinary circumstances in support of her asylum application. However, the asylum officer believed that Petitioner has not filed her asylum application within a reasonable time of those extraordinary circumstances.

The asylum officer could not have found changed or extraordinary circumstances unless grounds existed for the grant of asylum. If grounds for asylum did not exist, Petitioner's circumstances would

not have been relevant to the decision of the asylum officer. At that stage of the case the sole issue was whether the delay in filing the asylum application was indeed reasonable.

Petitioner was served with a Notice to Appear and, at the initial Master Immigration Court Hearing, the court was informed that a new asylum application would be filed because the initial application was not prepared by an attorney. Petitioner's counsel filed the new application with factual contentions that Petitioner's husband, upon his return to Indonesia, was beaten because he is ethnic Chinese and a Christian. Petitioner provided years worth of news media documentary evidence on the conditions in Indonesia and the failure and/or collusion of the Indonesian government to protect ethnic Chinese Christians from being beaten, injured and murdered by roving bands of Muslim militant groups that the government either could not, or would

not, control.

At one point the media reported that substantial changes were occurring in the political polices of the Indonesian government and the Juharto regime was being ousted. Due to these apparent changed circumstances Petitioner waited to file her political asylum application. It was not until much later that it became apparent, through media reports, that the conditions were actually worsening. Christian churches in Petitioners town were being fire bombed, Muslim paramilitary troops were murdering ethnic Chinese Christians in the streets with impunity, and the government was apparently providing arms to the Muslim troops. These conditions were country wide and were documented in the media articles attached to Petitioner's application. The State Department reports produced at trial also supported these claims.

However, the trial judge refused to take any of these facts into account. Petitioner contends that the trial judge was flippant and mocking the Petitioner and her counsel. The judge continually interrupted petitioner's counsel, asked his own questions, and then queried do you have anything else (sic); in other words aren't you done yet? The judge asked several times, do you have anything else because I want you to be able to present anything you want (sic), again, in other words are you done yet? Trial counsel was not allowed to present the case in a flowing cohesive manner.

The main basis of the judge's decision was that Petitioner's husband was allowed to return to the United States after he was beaten by troops, and that the beating was due to his involvement in a bank formerly owned by a high government official; and that the evidence only showed generalized country conditions. However, there was no evidence that the beating was due to

involvement in the bank. Petitioner's husband is ethnic Chinese and a Christian. It is equally likely that he was beaten by troops who supported the Muslim power structure. Petitioner's husband's ability to return for a short visit is not dispositive. Petitioner testified that her husband was afraid that if he did not return in the allotted time his family, still in Indonesia, would be harmed. Petitioner contends the court abused its discretion by not granting asylum.

PROCEEDINGS BELOW

Petitioners had their immigration trial on May 14, 2002. As set forth above the Immigration Court ruled against the petitioners. The petitioners filed for administrative review with the Executive Office for Immigration Review (Board of Immigration Appeals of the BIA). The BIA issued a one page ruling summarily confirming the Trial Judge's decision on October 23, 2003.

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Petitioners timely filed for review with the Ninth Circuit Court of Appeals which denied the appeal on January 18, 2005. Petitioner now submit this Petition for Writ of Certiorari.

REASONS TO GRANT WRIT OF CERTIORARI

DUE PROCESS

It is virtually impossible to present a case when an attorney is constantly being interrupted by a judge that is rushing him and showing disdain for the case. Petitioner contends that the actions of the judge constitute an violation of due process, since the facts of the case support an asylum claim, and since the judge was not neutral, was snide and aggressive, and he failed to give a full and fair opportunity to present the case.

The court's holding in Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) held

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that the Court of Appeals reviews due process claims de novo, and will reverse on due process grounds if the proceeding was "so fundamentally unfair that the alien was prevented from reasonably presenting his case." Colmenar also held that a due process violation occurred where "the IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel."

See also Reyes-Melendez v. INS, 02-70526, 2003 WL 22053448 (9th Cir. Sept. 4, 2003) which held that due process was violated where an IJ was aggressive, snide and accused the applicant of moral impropriety.

THE BIA FAILED TO PROVIDE AN INDIVIDUALIZED RULING

The BIA is required to provide

individualized rulings and may not rely on boilerplate decisions. The BIA decision in this matter was nothing more than boilerplate.

The court in Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995) (quoting Castillo v. INS, 951 F2d 1117, 1121 (9th Cir. 1991) held, The BIA's decision "must contain a statement of it's reasons for denying the petitioner relief adequate for us to conduct our review".

PETITIONER WAS QUALIFIED FOR ASYLUM AND THE COURT ABUSED IT'S DISCRETION.

To establish eligibility for asylum, a petitioner must show that he or she is a "refugee" within the meaning of I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), I.N.A. § 208(b)(1), 8 U.S.C. § 1158(b)(1) (Supp. II 1996). A refugee is defined as a person who is unwilling or unable to return to his

home country because he has experienced past persecution or has a well founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion.

An applicant's testimony alone may be sufficient to meet the burden of proving past persecution if such testimony is candid, credible, and sincere. See Kataria v. I.N.S. 232 F. 3d 1107, 1114 (9th Cir. 2000). To meet the burden of showing a well founded fear of future persecution, an applicant must demonstrate that his or her fear is both subjectively genuine and objectively reasonable. Id. At 1113.

Asylum may be granted not only when the government is the oppressor, but also when the government is unable or unwilling to control a non-governmental group, i.e. Salvadoran death squads, the Provisional Irish Republican Army, or the Bosnian Serb militia. See Matter of

Villalta, 20 I&N 142 3126 (BIA 1990), McMullen v. INS 658 F.2d 1312 (9th Cir 1981), Llana Castellon v. INS, 16 F.3d 1093 (10th Cir 1994, and Matter of S-A, 21 I&N Dec. (Interim Decision No. 3433, BIA 2000).

"Well founded fear" includes both an objective and a subjective element. The subjective element means that the applicant's fear must be genuine. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). In the instant case the Petitioner has produced ample evidence of her subjective fears. Petitioner has been monitoring the news media for years and she provided numerous newspaper and magazine articles to demonstrate that fear.

The objective element has been interpreted to mean that a reasonable person would fear persecution. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), Guevara-Flores v. INS, 786 F2d. 1242 (5th Cir. 1986). Any reasonable

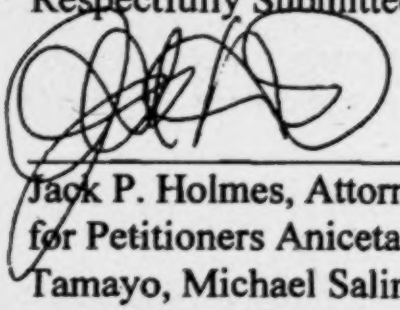
person would fear persecution, if they were an ethnic Chinese Christian, based on what is occurring in Indonesia. It is now common knowledge that extreme Muslim terrorist groups, including Al Queda, operate out of Indonesia.

Petitioner contends that she provided ample evidence that a family member, her husband, had suffered past persecution due to his ethnicity and religious beliefs, and that Petitioner and her children would suffer, in the future, persecution due to their ethnicity and religious beliefs if returned to Indonesia. Until such a time that the government of Indonesia is able or willing to control the violence against Ethnic Chinese Christians, Petitioner should be eligible for asylum.

CONCLUSION

The Petition For Writ Of Certiorari should be granted.

Respectfully Submitted,



Jack P. Holmes, Attorney for Petitioners Aniceta Tamayo, Michael Salim and Christian Salim

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 18 2005

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS

ANICETA JUANITA FORONDA TAMAYO; et. al.,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

No. 03-73955

Agency Nos. A75-721-730 A75-721-731 A78-111-912

MEMORANDUM*

On Petition for Review of an Order of

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the Board of Immigration Appeals

Submitted January 10, 2005**

Before: BEEZER, HALL and SILVERMAN, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Aniceta Juanita Foronda Tamayo and her two children are citizens of Indonesia and petition for review of a decision of the Board of Immigration Appeals ("BIA") affirming the immigration judge's ("IJ") denial of her application for asylum and withholding of removal. We dismiss in part and deny in part.

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Tamayo's asylum claim is unreviewable by this court because the BIA determined that her claim was untimely. See 8 U.S.C. 1158(a)(3); Hakeem v. INS, 273 F. 3d 812, 815 (9th Cir. 2001). Accordingly, we dismiss the petition for review of her asylum claim.

We have jurisdiction over the remainder of Tamayo's petition under 8 USC 1252(a) and review for substantial evidence. See Hakeem, 273 F.3d at 816. Because the BIA affirmed and adopted the IJ's decision, this court reviews the IJ's reasons for denial as though they were stated by the BIA. See Al-Harbi v. INS, 242 F.3d 882, 887-88 (9th Cir. 2001).

Substantial evidence supports the IJ's reasons for denying Tamayo's withholding of removal claim because Tamayo's testimony and application do not demonstrate that there is a "clear probability" that she will face persecution on account of her ethnicity

or religion if returned to Indonesia. See Hoxha v. Ashcroft, 319 F3d. 1179, 1185 (9th Cir. 2003) (concluding that one physical incident and on-going harassment was insufficient to establish withholding or removal). Tamayo's experiences, , which she self describes in the record as "minor," and consist of a single incident of rock throwing at her church, harassment of her children, and one attack on her husband by militants, do not indicate that she has suffered past persecution or that it is "more likely than not" that she will be persecuted if returned to Indonesia. See id. Accordingly, we deny the petition on the withholding of removal claim.

Tamayo's due process contentions also fail because she did not show that her hearing was fundamentally unfair, that she was prevented from presenting her case, or that the outcome of her case was potentially prejudiced. Cf. Colemenar v. INS, 210F3d. 967, 971-72 (9th Cir. 2000)(granting a due process claim

because IJ relied solely upon petitioner's written application and prevented the petitioner from explaining any of the information on the application).

Finally, we conclude that the BIA's opinion was not a "boilerplate" decision because the BIA expressly incorporated the IJ's reasoned analysis as its own. See Alaelua v. INS, 45 F3d. 1379, 1382 (9th Cir. 1995).

PETITION FOR REVIEW DISMISSED in part and DENIED in part.

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U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A75 721 730 - Los Angeles
Date OCT 03 2003

In Re: TAMAYO, ANICETA JUANITA FORONDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jack P. Holmes, Esq.

ORDER:

PER CURIAM: We affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994)(noting that adoption or

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affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement of the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We note that the Immigration Judge correctly determined that the respondent's asylum application is time barred under the regulations and that none of the exceptions applies. 8 C.F.R. 208.4. The respondent on appeal proffers additional evidence to support her asylum application. This board is an appellate body whose function is to review, not to create, a record. Matter of Fedorenko, 19 I&N Dec. 57, 74 (BIA 1984). We do not consider evidence submitted for the first time on appeal, but will instead adjudicate the appeal on the basis of the record of proceeding before the Immigration Judge as that is the record which the Board reviews. See Matter of C-, 20 I&N Dec. 529, 530, n.2 (BIA 1992); Matter of Haim, 19 I&N Dec. 641, 643 (BIA 1988). We

note, however, that we do not find this newly offered evidence sufficient to warrant reopened proceedings before the Immigration Judge even when considered with the existing evidence of record. The appeal is didmissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. 1240.26(c), (f). IN the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

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NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the District Director, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(b) of the Act.

Signature
For the Board

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